A

Sharil @ Shahrir bin Ab Samad v Tommy Thomas @ Mohan a/l K Thomas & Ors

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-21NCvC-86–12 OF 2023
ROZ MAWAR J
9 DECEMBER 2024

C *Civil Procedure — Striking out — Application to strike out action — Plaintiff charged under s 4(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 — Charge against plaintiff was withdrawn — Plaintiff filed action against former Attorney General ('AG') premised on malicious prosecution and misfeasance in public office — Former AG*
D *applied to strike out plaintiff's action — Whether civil claim of malicious prosecution and misfeasance in public office could be maintained against AG in light of art 145(3) of the Federal Constitution — Whether plaintiff had pleaded sufficient particulars to establish reasonable cause of action — Whether there were*
E *conflicts of material evidence that rendered striking out inappropriate — Whether plaintiff's claim obviously unsustainable, vexatious or abuse of process — Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 s 4(1) — Federal Constitution art 145(3) — Rules of Court 2012 O 18 r 19(1)(a), (1)(b), (1)(c) & (1)(d)*

F

Constitutional Law — Attorney General — Prosecutorial immunity — Plaintiff filed action against former Attorney General ('AG') premised on malicious prosecution and misfeasance in public office — Former AG applied to
G *strike out plaintiff's action — Whether civil claim of malicious prosecution and misfeasance in public office could be maintained against AG in light of art 145(3) of the Federal Constitution — Whether AG's discretion could only be challenged via judicial review — Whether prosecutorial discretion non-justiciable — Whether prosecutorial immunity was absolute — Federal Constitution art 145(3)*

H

In year 2013, the plaintiff who was an active member of UMNO had used his personal savings of over RM1m to revive an abandoned low-cost housing project in Larkin, Johor Bahru ('the project'). Towards the end of 2013, the plaintiff met with the then UMNO President, Dato' Seri Najib Razak to seek
I financial assistance in relation to the project. Dato' Seri Najib then gave the plaintiff a cheque for RM1m as reimbursement and to fund the continued revival of the said project. After Pakatan Harapan won the 14th General Election, the first defendant was appointed as Attorney General ('AG') while the second defendant was appointed Chief Commissioner of Malaysian

Anti-Corruption Commission ('MACC'). Many UMNO politicians were then investigated by MACC including the plaintiff. Following such investigation, the plaintiff was charged under s 4(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 for failing to declare the RM1m received from Dato' Seri Najib as income. During the trial at the High Court, the prosecution's own witnesses revealed that the investigations were incomplete. The charge against the plaintiff was subsequently withdrawn and consequently, the plaintiff was acquitted and discharged by the court. The plaintiff then filed an action against the defendants for declarations that the defendants jointly and/or severally conducted and were liable for malicious prosecution and misfeasance in public office against the plaintiff. In response, the first defendant via encl 13, applied to strike out the plaintiff's suit pursuant to O 18 r 19(1)(a), (1)(b), (1)(c) and (1)(d) of the Rules of Court 2012. The main issues that arose in encl 13 were: (a) whether a civil claim of malicious prosecution and misfeasance in public office could be maintained against the AG in light of art 145(3) of the Federal Constitution ('the FC') — in relation to this issue, the first defendant argued, inter alia, that the recent Federal Court decision in *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209 ('Sundra Rajoo') only allowed judicial review of prosecutorial discretion in rare and exceptional circumstances, and therefore, judicial review was the only recourse available to the plaintiff; (b) if such claims were maintainable, whether the plaintiff had pleaded sufficient particulars to establish a reasonable cause of action; and (c) whether there were conflicts of material evidence that rendered a striking out inappropriate at this stage.

Held, dismissing encl 13 with costs in the cause:

(1) With respect to the first issue, the court found that: (a) the case of *Sundra Rajoo* did not stand as authority that the AG's discretion could only be challenged by way of judicial review; (b) if prosecutorial discretion could be judicially reviewed on grounds of mala fide as was held in the case of *Sundra Rajoo*, a freestanding civil claim premised on malice should similarly be permissible, as such, the argument regarding the non-justiciability of prosecutorial discretion no longer presented an insurmountable hurdle; (c) even under English common law, courts had recognised the feasibility of malicious prosecution claims notwithstanding the prosecutorial immunity; and (d) prosecutorial immunity could not be absolute and must yield in exceptional cases where prosecutorial power had been abused for improper motives. As such, the court held that claims for malicious prosecution and misfeasance in public office could lie against the AG in appropriate cases and it was not a legal position contrary to art 145(3) of the FC (see paras 10–13 & 16).

(2) Upon examining the plaintiff's statement of claim, the court was satisfied that the essential elements for malicious prosecution had been properly particularised. The plaintiff had pleaded that the first defendant set the criminal law in motion against him by consenting to the charge, that there was no reasonable or probable cause for the charge, that the first defendant was actuated by malice or improper purpose, that the proceedings terminated in the plaintiff's favour through an acquittal, an that the plaintiff suffered damage to his reputation (see para 19).

(3) The particulars pleaded for misfeasance were likewise sufficient. The tort of misfeasance, aimed at preventing abuse of public power, required establishing that a public officer acted with targeted malice or reckless indifference in abusing his power. The plaintiff's pleadings particularising the purported first defendant's improper motives, deliberate failure to scrutinise the investigation, and hasty decision to charge despite incomplete papers, amply established a reasonable cause of action for misfeasance in public office (see para 22).

(4) Even if there was doubt about the adequacy of the pleadings, the present application must fail due to clear conflicts on material facts and evidence. It was trite that a striking out application should not be allowed where there were factual conflicts that required a trial for determination. In the present case, the affidavit evidence revealed obvious conflicts on key issues such as the first defendant's alleged pressuring of MACC investigations, the incomplete state of the investigation papers, and the plaintiff's information to the authorities that the RM1m was a reimbursement. The first defendant had largely made bare denials without properly addressing or refuting the plaintiff's specific averments (see para 25).

(5) The court acknowledged that the AG must be in a position to carry out his constitutional obligations without the constant worry of looking over his shoulders for the reactive responses that blew onto his direction. However, in the present exceptional instance, the first defendant's published statements in his book formed a crucial plank of the plaintiff's case theory. They provided the clearest link between the alleged malice and the overt act of prosecution. The fact that the evidence came form the first defendant's own pen made it impossible to ignore or summarily discount. Seen holistically, they reinforced the case for allowing the claim to be ventilated at a full trial where the first defendant would have the opportunity to explain those statements and be tested by cross-examination (see para 31).

(6) For the above reasons, the court found that the plaintiff's claim was not suitable for a striking out under any of the limbs of O 18 r 19(1) of the Rules of Court 2012. The claim was not obviously unsustainable, vexatious or an abuse of process. On the contrary, based on the pleadings

and affidavit evidence, it disclosed a reasonable cause of action that plainly deserved to be tried (see para 32).

[Bahasa Malaysia summary

Pada tahun 2013, plaintif yang merupakan ahli UMNO yang aktif telah menggunakan wang simpanan peribadinya melebihi RM1 juta untuk memulihkan projek perumahan kos rendah yang terbengkalai di Larkin, Johor Bahru ('projek tersebut'). Menjelang penghujung tahun 2013, plaintif bertemu dengan Presiden UMNO ketika itu, Dato' Seri Najib Razak untuk mendapatkan bantuan kewangan berhubung projek tersebut. Dato' Seri Najib kemudian memberikan plaintif cek bernilai RM1 juta sebagai bayaran ganti dan untuk membiayai pemulihan berterusan projek tersebut. Selepas Pakatan Harapan memenangi Pilihan Raya Umum Ke-14, defendan pertama dilantik sebagai Peguam Negara manakala defendan kedua dilantik sebagai Ketua Pesuruhjaya Suruhanjaya Pencegahan Rasuah Malaysia ('SPRM'). Ramai ahli politik UMNO kemudiannya disiasat oleh SPRM termasuk plaintif. Berikutan siasatan tersebut, plaintif didakwa di bawah s 4(1) Akta Pencegahan. Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan. Hasil daripada Aktiviti Haram 2001 kerana gagal mengisytiharkan RM1 juta yang diterima daripada Dato' Seri Najib sebagai pendapatan. Semasa perbicaraan di Mahkamah Tinggi, saksi-saksi pihak pendakwaan sendiri telah mendedahkan bahawa siasatan yang dijalankan tidak lengkap. Pertuduhan terhadap plaintif kemudiannya ditarik balik dan seterusnya, plaintif telah dibebaskan dan dilepaskan oleh mahkamah. Plaintif kemudiannya memfailkan tindakan terhadap defendan-defendan untuk pengisytiharan bahawa defendan-defendan secara bersama dan/atau berasingan menjalankan dan bertanggungjawab untuk pendakwaan berniat jahat dan misfeasans semasa menjawat jawatan awam terhadap plaintif. Sebagai tindak balas, defendan pertama melalui lampiran 13, memohon untuk membatalkan saman plaintif menurut A 18 k 19(1)(a), (1)(b), (1)(c) dan (1)(d) Kaedah-Kaedah Mahkamah 2012. Isu-isu utama yang timbul dalam lampiran 13 ialah: (a) sama ada tuntutan sivil berbentuk pendakwaan berniat jahat dan misfeasans semasa menjawat jawatan awam boleh dikekalkan terhadap Peguam Negara mengambil kira perkara 145(3) Perlembagaan Persekutuan ('PP') — berhubung dengan isu ini, defendan pertama berhujah, antara lain, bahawa keputusan Mahkamah Persekutuan baru-baru ini dalam kes *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209 ('Sundra Rajoo') hanya membenarkan semakan kehakiman ke atas budi bicara pendakwaan dalam keadaan yang jarang dan luar biasa dan semakan kehakiman adalah satu-satunya cara yang tersedia kepada plaintif; (b) jika tuntutan sedemikian boleh dikekalkan, sama ada plaintif telah memplid butiran yang mencukupi untuk mewujudkan kausa tindakan yang munasabah; dan (c) sama ada terdapat percanggahan keterangan material yang menyebabkan pembatalan tidak sesuai pada peringkat ini.

Diputuskan, menolak lampiran 13 dengan kos di dalam kausa:

(1) Berkenaan dengan isu pertama, mahkamah mendapati bahawa: (a) kes *Sundra Rajoo* bukanlah otoriti bahawa budi bicara Peguam Negara hanya boleh dicabar melalui semakan kehakiman; (b) jika budi bicara pendakwaan boleh disemak semula secara kehakiman atas alasan mala fide seperti yang diputuskan dalam kes *Sundra Rajoo*, tuntutan sivil yang bebas yang berasaskan niat jahat juga harus dibenarkan, oleh itu, hujah bahawa budi bicara pendakwaan tidak boleh dihakimi tidak lagi memberikan halangan yang tidak dapat diatasi; (c) di bawah undang-undang biasa Inggeris juga, mahkamah telah mengiktiraf kebolehlaksanaan tuntutan pendakwaan berniat jahat walaupun terdapat kekebalan pendakwaan; dan (d) kekebalan pendakwaan tidak boleh mutlak dan perlu tunduk dalam kes-kes luar biasa di mana kuasa pendakwaan telah disalahgunakan untuk motif yang tidak wajar. Oleh itu, mahkamah berpendapat bahawa tuntutan untuk pendakwaan berniat jahat dan misfeasans semasa menjawat jawatan awam boleh dibuat terhadap Peguam Negara dalam kes-kes yang sesuai dan ia bukanlah kedudukan undang-undang yang bertentangan dengan perkara 145(3) PP (lihat perenggan 10–13 & 16).

(2) Setelah meneliti pernyataan tuntutan plaintif, mahkamah berpuas hati bahawa elemen penting untuk pendakwaan berniat jahat telah diperincikan dengan betul. Plaintif telah memplid bahawa defendan pertama menggerakkan undang-undang jenayah terhadapnya dengan bersetuju dengan pertuduhan tersebut, bahawa tiada kausa yang munasabah atau berkemungkinan untuk pertuduhan tersebut, bahawa defendan pertama telah digerakkan oleh niat jahat atau tujuan yang tidak wajar, bahawa prosiding tersebut ditamatkan dengan memihak kepada plaintif melalui pembebasan, dan bahawa plaintif mengalami kerosakan pada reputasinya (lihat perenggan 19).

(3) Butiran yang diplid untuk misfeasans juga memadai. Tort misfeasans, yang bertujuan untuk mencegah penyalahgunaan kuasa awam, memerlukan pembuktian bahawa pegawai awam bertindak dengan niat jahat atau sikap ketidakacuhan melulu dalam menyalahgunakan kuasanya. Pliding plaintif yang memperincikan motif tidak wajar defendan pertama yang dikatakan, kegagalan yang disengajakan untuk meneliti penyiasatan, dan keputusan tergesa-gesa untuk mendakwa walaupun kertas siasatan tidak lengkap, mewujudkan dengan cukup kausa tindakan yang munasabah untuk misfeasans semasa menjawat jawatan awam (lihat perenggan 22).

(4) Andai kata terdapat keraguan tentang kecukupan pliding sekali pun, permohonan semasa masih gagal disebabkan oleh konflik yang jelas mengenai fakta material dan keterangan. Adalah lazim bahawa permohonan pembatalan tidak boleh dibenarkan jika terdapat konflik

fakta yang memerlukan perbicaraan untuk penentuan. Dalam kes semasa, keterangan afidavit mendedahkan konflik yang jelas mengenai isu-isu penting seperti defendan pertama yang didakwa mendesak siasatan SPRM, keadaan kertas siasatan yang tidak lengkap, dan maklumat plaintif kepada pihak berkuasa bahawa RM1 juta tersebut merupakan pembayaran ganti. Defendan pertama sebahagian besarnya telah membuat penafian semata-mata tanpa menangani atau menyangkal hujahan spesifik plaintif dengan betul (lihat perenggan 25).

(5) Mahkamah mengakui bahawa Peguam Negara mesti berada dalam kedudukan untuk melaksanakan kewajipan perlembagaannya tanpa rasa bimbang yang berterusan untuk sentiasa berjaga-jaga dengan maklum balas reaktif yang datang ke arahnya. Walau bagaimanapun, dalam keadaan luar biasa semasa, pernyataan defendan pertama yang diterbitkan dalam bukunya membentuk galang penting bagi teori kes plaintif. Ia memberikan perkaitan paling jelas antara dakwaan niat jahat dan perbuatan terbuka pendakwaan. Hakikat bahawa keterangan tersebut datang dari penulisan defendan pertama sendiri menjadikannya mustahil untuk diabaikan atau diketepikan secara terus. Dilihat secara holistik, ia mengukuhkan kes bagi membenarkan tuntutan tersebut dibicarakan dalam perbicaraan penuh di mana defendan pertama akan berpeluang menjelaskan pernyataan tersebut dan diuji melalui pemeriksaan balas (lihat perenggan 31).

(6) Atas sebab-sebab di atas, mahkamah mendapati bahawa tuntutan plaintif tidak sesuai untuk dibatalkan di bawah mana-mana bahagian A 18 k 19(1) Kaedah-Kaedah Mahkamah 2012. Tuntutan tersebut bukanlah jelas tidak mampan, menyusahkan atau penyalahgunaan proses. Sebaliknya, berdasarkan pliding dan keterangan afidavit, ia mendedahkan kausa tindakan yang munasabah yang secara jelas patut dibicarakan (lihat perenggan 32).]

Cases referred to

Ansar v Llyod TSB Bank plc [2006] EWCA Civ 1462, CA (refd)

B Surinder Singh Kanda v Government of the Federation of Malaya [1962] 1 MLJ 169; [1962] AC 322 ; [1962] 1 MLRA 233, PC (refd)

Comsa Farms Bhd v Malaysian Assurance Alliance Bhd (No 1) [2012] 10 MLJ 526; [2012] 3 CLJ 724; [2012] 3 MLRH 26; [2012] 4 AMR 115, HC (refd)

Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Anor (No 3) [2005] 5 MLJ 561; [2005] 5 MLRH 160, HC (refd)

Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293; [2006] 1 MLRA 89; [2006] 1 CLJ 577, FC (refd)

Deleum Primera Sdn Bhd v Mazrin bin Ramli & Ors [2021] 11 MLJ 100; [2021] MLRHU 404, HC (refd)

Ewe Saw Lee v Dato' Sri Andrew Kam Tai Yeow [2023] MLJU 1161; [2023] MLRHU 868, HC (refd)
Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin [1995] 2 MLJ 213; [1995] 1 MLRA 311, CA (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama Serbaguna Sungai Gelugor dengan tanggungan [1999] 3 MLJ 1; [1999] 1 MLRA 336; 1999] 3 CLJ 65; [1999] 3 AMR 3529, FC (refd)
Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners) [2007] 5 MLJ 501; [2007] 1 MLRA 719; [2007] 4 CLJ 725, FC (refd)
Mohamed Ezam bin Mohd Nor & Ors Ketua Polis Negara [2002] 1 MLJ 321; [2002] 2 MLRA 46; [2001] 4 CLJ 701, FC (refd)
Phillips and others v Symes and others [2005] 4 All ER 519, HC (refd)
PP v Seeralan [1985] 2 MLJ 30; [1985] 1 MLRA 138, SC (refd)
PP v Tengku Adnan bin Tengku Mansor [2020] 5 MLJ 220; [2020] 9 CLJ 30; [2020] 6 AMR 235; [2020] 4 MLRA 730, FC (refd)
Residence Hotel and Resorts Sdn Bhd v Seri Pacific Corp Sdn Bhd [2014] 10 MLJ 413; [2013] MLRHU 1270, HC (refd)
Richmond River Broadcasters Pty Ltd v Australian Broadcasting Tribunal [1992] 106 ALR 671, CA (refd)
Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim [2015] 3 MLJ 609; [2015] 2 MLRA 205; [2015] 2 CLJ 1037; [2015] 2 AMR 124, FC (refd)
Vakauta v Kelly [1989] 87 ALR 633, HC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 s 4(1)(a)
Courts of Judicature Act 1964 s 68
Criminal Procedure Code s 245(3)
Federal Constitution arts 8, 13, 125(3B), 145(3)
Income Tax Act 1967 s 113(1)(a)
Judges' Code of Ethics 2009 codes 5, 7(3), (4)
Rules of Court 2012 O 18 r 19, 19(1)(a), (1)(b), (1)(c), (1)(d)

Syed Faisal Al-Edros (with Syahrul Syazwan Salehin, Firoz Hussein bin Ahmad Jamaluddin, Syahrul Syazwan Salehin, Iqbal Harith Liang, Firdaus Danial and Harel Nieryan (Pupil in Chambers)) (Fahri, Azzat & Co) for the plaintiff.
Alan Adrian Gomez (with Wong Ying Ying, Haikal Mahyussin, Merlyn Lai Wei Shiung, Irfan Halm, Yap Xue You (Pupil in Chambers)) (Tommy Thomas) for the first defendant.
Nur Ezdian Rosleh (with Zetty Zurina Kamaruddin, Siti Syakimah, Siti Norashikin and Syafiq Affandy bin Hasan) (Senior Federal Counsel, Attorney General Chambers) for the second, third and fourth defendants.

Roz Mawar J:

DECISION

[1] The application for recusal of judges is a serious legal matter that requires careful and thorough scrutiny. While litigants have the right to seek impartiality in the judicial process, such requests must meet specific legal thresholds to ensure they are based on legitimate grounds. The potential for abuse in allowing parties to arbitrarily select or exclude judges could undermine the integrity of the judicial system and the principle of impartiality. Therefore, it is essential that applications for recusal be examined with diligence to prevent any erosion of public trust in the courts while safeguarding the right to a fair trial.

[2] The first defendant (D1) cited the Judges' Code of Ethics 2009 prescribed under art 125(3B) of our Federal Constitution ('the FC') and/or the inherent jurisdiction of the court in his application for me to recuse myself from adjudicating this case that the plaintiff had initiated against him and three others. This came after I had considered his earlier application to strike out the plaintiffs suit under O 18 r 19 of the Rules of Court 2012 ('the ROC') and thereafter dismissed his application. I found that I could not dismiss the plaintiff's suit summarily and would determine the merits at full trial.

[3] In essence, the basis for D1's application is on the contention that I have pre-judged the case against him. Such contention, according to D1 is premised on my decision of dismissing his application to strike out the plaintiffs case and set this case for trial.

BACKGROUND FACTS

[4] D1 was the Attorney General and public prosecutor ('PP') of Malaysia from June 2018 to February 2020.

[5] The plaintiff is a member of UMNO (a political party that was part of the Federal Government from 1957 until its defeat on 9 May 2018 at the 14th General Election) and was elected to the Johor Bahru Parliamentary constituency in the 13th General Election on 5 May 2013.

[6] In the exercise of his discretion as PP under art 145(3) of the FC, D1 had charged the plaintiff in January 2020 with a money laundering offence under s 4(1)(a) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLA') for failing to declare to the Inland Revenue Board his earnings of RM1m in violation of s 113(1)(a) of the Income Tax Act 1967 ('the charge').

[7] D1 resigned as the Attorney General and PP on 28 February 2020. The criminal prosecution proceeded against the plaintiff on 26 July 2022. More that 20 witnesses were called by the prosecution.

[8] On 5 January 2023, the prosecution applied a discharge not amounting to an acquittal of the plaintiff. The application was made under s 245(3) of the Criminal Procedure Code ('the CPC') but the High Court had ordered a discharge amounting to an acquittal of the plaintiff.

[9] On 4 December 2023 the plaintiff initiated this case before me against D1 for malicious prosecution in respect of the charge. The plaintiff pleaded that the investigation by the Malaysian Anti-Corruption Commission, the third defendant here (D3) of which D1 had premised the charge, was incomplete. The plaintiff pleaded that despite being presented with an incomplete investigation paper (IP) from D3, D1 had intentionally failed and/or refused to instruct/request the investigation to be completed before deciding to grant consent to prosecute.

[10] The plaintiffs causes of action against D1 and the other defendants include:

(a) malicious investigation and malicious arrest;

(b) misfeasance in public office;

(c) violation of plaintiff's right to equality under art 8 of the FC; and

(d) violation of the plaintiffs right to property under art 13 of the FC.

[11] On 8 February 2024, D1 filed his application to strike out the plaintiffs claim under O 18 r 19(1)(a), (1)(b), (1)(c) and (1)(d) of the ROC. The hearing of arguments for D1's striking out application took place on 30 May 2024 and 7 June 2024.

[12] On 3 July 2024, I had dismissed D1's striking out application. I took the trouble to iterate my reasoned decision, encapsulated in a written form. For D1's striking out application, his arguments were assessed to ascertain whether summarily striking out the plaintiffs claim had merit. Having exercised my judicial mind to the application and the evidence adduced through the affidavits, I ruled amongst others, that a claim for malicious prosecution and misfeasance can lie against the Attorney General as he is not immunised from such causes of action by virtue of prosecutorial immunity.

[13] I found that D1 did not provide any cogent reason to depart from the authorities that held the Attorney General does not have total prosecutorial immunity. In the absence thereof, a claim for malicious prosecution and

misfeasance in public office can lie against the Attorney General in appropriate case. I must therefore hear the case and carry out an assessment whether the plaintiff can prove his case on a balance of probabilities. This case is not one that I can determine summarily.

[14] Directions for trial were given to the parties and trial dates were set.

[15] There was no appeal lodged at the Court of Appeal against my decision. The amendment to s 68 of the Courts of Judicature Act 1964 ('the CJA') now prevent litigants from appealing against any dismissal of striking out application at the High Court.

[16] On 26 August 2024, D1 filed this application for recusal (encl 48).

PREFACE OF THE PLAINTIFF'S WRITTEN SUBMISSIONS

[17] On this note of that change in the CJA. The plaintiff submitted that this recusal application is D1's veiled attempt to assail my decision, where para 34 of D1's affidavit in support (encl 49) is referred to. It is reproduced herein for easy reference:

> Due to the changes in the law with effect from 1 October 2022, a party can no longer appeal a dismissal by the High Court of a Striking Out Application. I am therefore unable to raise these clear errors made by Justice Roz Mawar before the Court of Appeal. Typically, where an appeal against a decision by a High Court Judge to strike out a suit is allowed, the Court of Appeal would direct that a new trial Judge be assigned to the suit. This is to ensure that there are no traces of bias or predetermination by the same Judge conducting the trial.

[18] It is the plaintiffs submissions that this recusal application is not genuine and made with the intention to circumvent the amendment to the CJA, regardless of its legislative intent. The mischief of the CJA amendment as highlighted by the plaintiff is to amongst others, to save judicial time and costs of litigants, without any prejudice to the rights of either party.

[19] At the hearing, this court's attention was invited to encl 50 which is D1's notice to refer to the affidavits filed for his striking out application. The plaintiff pointed out that this was the 'back door' way to revisit the arguments already ventilated there when the decision of this recusal is appealed before the Court of Appeal. The plaintiff argued that it was akin to judge shopping which further emphasised that D1's application for my recusal is baseless.

D1'S SUBMISSIONS FOR RECUSAL

[20] Before I decide on that argument, I must consider D1's submissions for my recusal. He submitted that this recusal application is premised on three grounds — (1) that my determinations his striking out application were not supported by the evidence; (2) that I had failed to address critical submissions by his counsel; and (3) that I had made unsubstantiated determinations on the merits of the case despite it being a striking out application.

[21] D1 cited paras 27 and 28 of my written decision to support his grouse. They are reproduced here with his emphasis which are underlined below, for my assessment:

> *The book published by the first defendant, titled 'My Story — Justice in the Wilderness' greatly features in this case*. It plays a significant role in the plaintiff's contention of malicious prosecution. The *plaintiff has relied on several statements and admissions made by the first defendant in the book to establish a prima facie case of improper motives and bad faith in the prosecution against him*. Specifically, the plaintiff highlighted the following aspects from the book:
>
> (a) the first defendant's admission that he remained a 'political lawyer' throughout his career, the plaintiff suggested a lack of impartiality.
>
> (b) the first defendant's account of how he lobbied various political and legal figures to be appointed as Attorney General — the plaintiff viewed it as an indication of a political agenda;
>
> (c) the *first defendant's acknowledgment of his role and efforts to topple the Barisan Nasional government*, which the plaintiff was a part of, the plaintiff maintained revealed a potential bias of the first defendant against the plaintiff; and
>
> (d) *most critically, the first defendant's statement about pressuring the MACC to investigate the plaintiff's role in FELDA and FELCRA for the purported wrongdoings, even after being told there was no evidence of any scandal*. This suggested a targeted and predetermined effort to find wrongdoings by the plaintiff.
>
> *These published statements, made by the first defendant himself* for public consumption, *lend substantial credence to the plaintiff's claim* of malicious prosecution. The plaintiff in his pleadings painted a picture of an Attorney General who was not objective and neutral, but *one who was actively seeking to uncover wrongdoing by political opponents through the use of prosecutorial power*. On the surface, *the first defendant's own words in the book gave context and meaning to his subsequent actions in charging the plaintiff despite incomplete investigations*. They *supported the inference that the prosecution was not driven by merits of the case, but by extraneous political considerations and a desire to tarnish the plaintiff* …

[22] D1 claimed that those findings are erroneous as his book made no

mention of the plaintiff at all. D1 submitted that a reasonable reading of his book would conclude that he merely urged speedier and more thorough investigation into public scandals involving billions of ringgit of trust monies from institutions like FELDA, FELCRA Bhd, MARA, Lembaga Tabung Haji and the like, and observed how D3, as an independent investigative body, had full autonomy over its own decision-making process and was not influenced even by the Prime Minister.

[23] It was D1's submissions that it was not the plaintiff's pleaded case that he had written his book of investigations with the plaintiff but that he had written of having urged speedier investigations by D3 on scandals involving FELDA, FELCRA having been informed there were no scandals found.

[24] D1 further submitted that I had failed to address his submissions in my decision that he was not personally involved in the criminal trial that had proceeded after he had left office. Also, that the plaintiff had not pleaded that D1 had no reasonable/probable cause for charging the plaintiff and yet I had not struck out the plaintiff's suit at the interlocutory stage. D1 claimed that I had made unsubstantiated determination of the case.

[25] The Federal Court cases of *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293; [2006] 1 MLRA 89; [2006] 1 CLJ 577 and *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501; [2007] 1 MLRA 719; [2007] 4 CLJ 725 were cited for the legal principle of real danger of bias at any stage of the proceedings. D1 urged me to find that there is a possibility rather than a probability of bias on my part where it was advocated that I have to recuse myself from hearing this case because I must also consider D1's right to a fair trial, and to have his trial before a judge who has not prejudged the case against him (Privy Council's case in *B Surinder Singh Kanda v Government of the Federation of Malaya* [1962] 1 MLJ 169; [1962] AC 322 ; [1962] 1 MLRA 233 and the Federal Court's decision in *Public Prosecutor v Tengku Adnan bin Tengku Mansor* [2020] 5 MLJ 220; [2020] 9 CLJ 30; [2020] 6 AMR 235; [2020] 4 MLRA 730 were referred to).

THE PLAINTIFF'S RESPONSE

[26] In addition to contending that D1 had initiated this application which is a veiled attempt to assail my decision to dismiss his application to strike out the plaintiffs claim, the other reason argued by the plaintiff in imploring me to dismiss D1's recusal application is that I did not made any prejudgment against D1. The High Court decision of *Residence Hotel and Resorts Sdn Bhd v Seri Pacific Corp Sdn Bhd* [2014] 10 MLJ 413; [2013] MLRHU 1270 was cited. It

A was submitted that prejudgment occurs only when a judge asserts that his mind is conclusively made up on a certain issue, and that there is nothing further that a party can say which could change his mind.

B **[27]** On the contrary, as aptly put 19 years later in the *Residence Hotel*'s case there is a strong presumption that judges honour their oath of office and do dispense justice without bias.

C **[28]** Paragraph 21 of my written decision was referred to by the plaintiff where his learned counsel submitted that I had not prejudged D1 nor the subject matter of the plaintiffs case. I had written as follows:

> It must be emphasised here that whether the plaintiff will be successful in establishing his claim on a balance of probabilities is for this court to determine after trial. When all evidence is adduced, this court will then make the findings. At this
D juncture, it is not for this court to decide the strength of the plaintiff's suit.

E **[29]** This court heard the plaintiff submitted that prejudgment occurs only when a judge asserts that his mind is conclusively made up on a certain issue, and that there is nothing further that a party can say which could change his mind, which the plaintiff submitted that is not the case (see *Richmond River Broadcasters Pty Ltd v Australian Broadcasting Tribunal* [1992] 106 ALR 671).

F **[30]** The plaintiff referred to para 25 of my written decision where I had called for a full trial due to the clear conflicts on material facts and evidence, is reproduced for easy reference:

> Finally, even if there is a doubt about the adequacy of the pleadings, the present application must fail due to clear conflicts on material facts and evidence. It is trite that a striking out application should not be allowed where there are factual
G conflicts that require a trial for determination. Here, the affidavit evidence revealed obvious conflicts on key issues like the first defendant's alleged pressuring of MACC investigations, the incomplete state of the investigation papers, and the plaintiff's information to the authorities that the RM1m was a reimbursement. The first defendant has largely made bare denials without properly addressing or refuting the
H plaintiff's specific averments.

I **[31]** Also referred to were paras 29 to 31 where I had emphasised the need for a full trial so that the 'truth can be ascertained in accordance with the time-honoured adversarial process that is the hallmark of our justice system' — also reproduced for accurate referencing:

> The first defendant's own admissions in his book constitute prima facie evidence of such improper motives. The fact that these statements were voluntarily published by the first defendant himself significantly bolsters their reliability and weight in supporting a finding of malice. At the very least, they raise grave questions about the

integrity of the prosecution that cry out for a full and fair hearing. Shutting out such evidence without subjecting it to the acid test of cross-examination would be a severe miscarriage of justice. As the High Court held in *Rosli bin Dahlan*:

> ... the court is only concerned with whether facts are pleaded with sufficient particulars to give rise to such remedies and it would then have to go to trial for the plaintiff to establish his case.

The first defendant's admissions in in the book, together with the troubling testimonies of the prosecution's own witnesses during trial, more than meet this threshold. They establish a prima facie case that the prosecution was tainted by bad faith and improper motives, rather than based on objective and complete investigations. It would be a travesty for the court to turn a blind eye to such weighty evidence and deny the plaintiff the opportunity to vindicate his claim at trial.

This court acknowledges that our Attorney General must be in a position to carry out his constitutional obligations without the constant worry of looking over his shoulders for the reactive responses that blows onto his direction. However, in this exceptional instance, the first defendant's published statements in his book form a crucial plank of the plaintiff's case theory. They provide the clearest link between the alleged malice and the overt act of prosecution. The fact that this evidence comes from the first defendant's own pen makes it impossible to ignore or summarily discount. Seen holistically, they reinforce the case for allowing the claim to be ventilated at a full trial where the first defendant will have the opportunity to explain those statements and be tested by cross-examination. Only then can the truth be ascertained in accordance with the time-honoured adversarial process that is the hallmark of our justice system.

[32] The plaintiff further submitted that my finding in the context of an interlocutory application such as a striking out application cannot be said to be a conclusive one which indicates prejudgment (see the Federal Court's judgment in *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609; [2015] 2 MLRA 205; [2015] 2 CLJ 1037; [2015] 2 AMR 124).

[33] The decision by the Court of Appeal in *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin* [1995] 2 MLJ 213; [1995] 1 MLRA 311 was also referred to by the plaintiff where the law does not assume bias so as to mandate the recusal of a judge unless the judge has an interest in the subject matter of the proceedings which is pecuniary or proprietary in nature. Several other cases were cited by the plaintiff that underlined the legal principle that findings and comments made by a decision-maker when hearing and deciding an interlocutory matter are usually unobjectionable that would not disqualify the decision-maker from hearing the case proper — *Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Anor (No 3)* [2005] 5 MLJ 561; [2005] 5 MLRH 160, *Phillips and others v Symes and others* [2005] 4 All ER 519 and *Ansar v Llyod TSB Bank plc* [2006] EWCA Civ 1462.

[34] The plaintiff reminded me during arguments that D1 did not deny or pleaded that his book was taken out of context. The plaintiff brushed D1's complaint aside on the point that he did not participate in the prosecution of the plaintiff as the premise of the suit was that it was D1 who had instructed for the charging of the plaintiff that ended with an acquittal. Nevertheless, I did consider D1's said submission as stated in para 6(c) and (d) of my written decision.

[35] The plaintiffs submitted in the alternative, that D1 did not adduce sufficient proof of real danger of bias to recuse me. The decision in *Residence Hotel*'s case was highlighted that held bias which was been described as the mental attitude of a judge towards a litigant, does not encompass views that the judge may have on the dispute.

THE LAW AND ITS APPLICATION

[36] I accord due regard to the Federal Court's decision in *Dato Tan Heng Chew* that featured forefront in D1's submissions concerning the established test to be adopted in recusal applications. The 'real danger of bias' test is the correct standard to be applied. Reference is also made to the Federal Court decisions in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1; [1999] 1 MLRA 336; 1999] 3 CLJ 65; [1999] 3 AMR 3529 and *Mohamed Ezam bin Mohd Nor & Ors Ketua Polis Negara* [2002] 1 MLJ 321; [2002] 2 MLRA 46; [2001] 4 CLJ 701. Additionally, as established in the Federal Court case of *Syarikat Kemajuan Timbermine Sdn Bhd*, my decision to dismiss D1's application to strike out the plaintiffs case did not finally determine the issues to be tried raised in the pleadings. These issues remain open for assessment and determination, which I will undertake at full trial. Thus, D1's contention that I had predetermined his case against him is without merit.

[37] My written decision contains prima facie observations, which I was duty bound to make in order to assess the merits of D1's application to strike out the plaintiffs suit. However, there is nothing in my written decision to suggest that I had conclusively determined the issues against D1. On at least two occasions that I expressly stated that the facts were to be tested in cross-examination at full trial. It follows therefore, that there was no prejudgment or predetermination of either the plaintiffs case or D1's defence at this juncture.

[38] The Court of Appeal in *Hock Hua Bank Bhd* through the words of the late Gopal Sri Ram JCA as he was when presiding over the case, articulated the following in the dismissing the application to recuse a judge on grounds of purported prejudgment — at p 220 of its judgment:

> It is part of the function of a judge hearing an application for an injunction to decide whether a serious question requiring trial is disclosed. He therefore does not exceed his proper role in such an interlocutory proceeding by commenting upon the credibility of the evidence or any issues as it lies before him at that stage. And any comments that he may make upon the nature and quality of the evidence or pleadings presented to him at that stage do not and cannot be said to infect his mind with bias. In my judgment, it is a most serious matter to allege bias against a judge whose sole function is to decide a case according to the evidence before him. I notice an unhealthy trend of late to allege bias too readily against a judicial arbiter on insufficient material. Nothing is capable of eroding public confidence in the judicial arm of the state than unwarranted and unfounded allegations of bias. It is therefore to be avoided at all costs, if necessary, by having resort to the power to punish for contempt.
>
> In my judgment, a judge may, after expressing a view in the course of an interlocutory proceeding, quite properly hear the main action and come to a conclusion diametrically opposite to that expressed at the interlocutory level. Translated to a case such as the present, a judge may grant an interlocutory injunction because he finds a particular line of defence taken to be untenable and yet, after hearing all the evidence and detailed argument at trial, reach the opposite conclusion and dismiss the suit. I cannot help but think that such an occurrence is commonplace in our courts as it is indeed in other jurisdictions.

[39] With regard to D1's claim that my determination on his striking out application were not supported by the evidence, this is what I find after due consideration; and it is this — I had taken into account all evidence, averments, admission and contents in all the cost papers of his said application. They were all reflected in my return reasoned decision. I find that he had miscomprehended my reasons touching on his published book. Because he made that publication that conveyed his position and desires, some being political in nature, meant that I could not cast a blind eye to those fact contained in his book. Thus, I could not dismiss preliminarily the plaintiff case. At the end of the day, it would be up to the plaintiff to satisfy me after full trial, on a balance of probabilities, a successful claim.

[40] Justice NHA Chan had agreed and added at p 223 that 'Other than an interest which pecuniary or proprietary in the subject matter of the proceeding, the law does not assume bias so as to disqualify a judge from acting in his judicial capacity'.

[41] On this basis, D1 had not provided evidence to illustrate that I have any pecuniary or proprietary interest in the subject matter of these proceedings. Furthermore, whilst the plaintiff cited several cases, it is unfortunate that D1 chose to pursue this recusal application despite the plaintiff's learned counsel gracious invitation to reconsider. Even if a preconceived opinion had been formed — which, in this case, is absent — it would not constitute real bias

sufficient to warrant my recusal (see *Vakauta v Kelly* [1989] 87 ALR 633). The allegations questioning my integrity as a judicial arbiter lacked merit and are wholly unnecessary in the context of this matter.

[42] There is an absolute devoid of fact to contend that I was unable to adhere and apply codes 5 and 7(3) and (4) of the Judges' Code of Ethics 2009 (prescribed pursuant to art 125(3B) of the FC) that respectively state:

> Upholding the integrity and independence of the judiciary.
>
> A judge shall exercise his judicial function independently of the basis of his assessment of the facts and in accordance with his understanding of the law, free from extraneous influence, inducement, pressure, threat or interference, direct or indirect from any quarter for any reason.
>
> Performing judicial duties fairly and efficiently.
>
> A judge shall perform his judicial duties without bias or prejudice. A judge shall dispose of all his judicial duties fairly, efficiently, diligently and promptly.

[43] My return reasoned decision had taken into consideration all arguments and submission that I had painstakingly accord the counsel much time to address the issue raised in D1's striking out application. It is evident that this recusal application lacks any factual basis. My written decision, expressed in straightforward and unambiguous terms, does not allude to any interpretation than what was explicitly penned. As remarked by my brother Justice Ong Chee Kwan in *Deleum Primera Sdn Bhd v Mazrin bin Ramli & Ors* [2021] 11 MLJ 100 at pp 122 and 123; [2021] MLRHU 404 respectively:

> Whilst the litigant is entitled to apply to recuse a judge, such application must only be made after considering the harm that it may inflict on the integrity of the judiciary and to the administration of justice if the grounds relied upon are frivolous and wholly unwarranted.
>
> To my mind, the cavalier manner in which the recusal applications were filed and the grounds relied upon were so frivolous and flimsy and if I may say, even disrespectful, that the entire recusal application border on contempt of court. In these circumstances, encls 246, 250 and 252 are dismissed with costs fixed at RM15,000 for each enclosures. The costs are to be borne by the counsel personally.

[44] This position, where the filing of recusal applications without careful consideration attracts jurisprudence relating to contempt, has been consistently upheld (in *Public Prosecutor v Seeralan* [1985] 2 MLJ 30; [1985] 1 MLRA 138 by the Supreme Court, the High Court cases of *Ewe Saw Lee v Dato' Sri Andrew Kam Tai Yeow* [2023] MLJU 1161; [2023] MLRHU 868 and *Comsa Farms Bhd v Malaysian Assurance Alliance Bhd (No 1)* [2012] 10 MLJ 526; [2012] 3 CLJ 724; [2012] 3 MLRH 26; [2012] 4 AMR 115). Given D1's professional experience, it is reasonable to expect that he was fully aware

of the potential implications of his recusal application on both myself and the judicial system.

[45] Furthermore, on the broader context, D1's affirmation in para 34 of his affidavit-in-support to his recusal application, reinforces the plaintiffs assertion that this recusal application represents an effort to circumvent the legislative amendments to s 68 of the Courts of Judicature Act 1964 ('the CJA'), which preclude revisiting points determined in interlocutory striking out applications dismissed by the High Court. This recusal application appears to challenge my earlier decision in his striking out application indirectly. In light of its timing and content, this recusal application could be perceived as an attempt to revisit points already determined, which is contrary to the legislative intent of the said amendments to the CJA.

[46] Accordingly. D1's application to recuse me is dismissed. Costs of RM20,000 is ordered to be paid to the plaintiff subject to allocator. All directions for trial must be complied with to ensure the smooth hearing of the case. I will hear and determine all issues pleaded by all parties then.

Enclosure 13 dismissed with costs in cause.

Reported by Dzulqarnain Ab Fatar